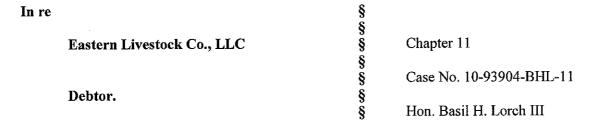
IN THE UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF INDIANA NEW ALBANY DIVISION



J&F OKLAHOMA HOLDINGS INC.'S MEMORANDUM IN OPPOSITION ON KREMLIN ISSUE MEMORANDUM

J & F OKLAHOMA HOLDINGS, INC. ("J&F") submits this Memorandum concerning the Kremlin Issues, as defined in the Scheduling Order of July 25, 2011 [Doc. No. 622] (the "Scheduling Order").

Summary of Memorandum

- 1. The Scheduling Order required interested parties to state their positions concerning the "Kremlin Issue." As applicable to J&F, the Kremlin Issue is whether the Bank of Kremlin has a security interest in 200 steers J&F bought from Mark Hohenberger ("Hohenberger"), who bought them from Eastern Livestock Co., LLC ("ELC"), which bought them from the bank's borrower, Brent Kuehny dba Dollar K Cattle Co. ("Kuehny").
- 2. This Memorandum identifies fact and legal issues that J&F contends the Bank of Kremlin must address to support its claim against J&F.

Facts

3. The Bank of Kremlin alleges that its borrower, Brent Kuehny dba Dollar K Cattle ("Kuehny") sold 200 steers to ELC on 11-01-10 for \$158,636.31, that ELC sold the cattle to Mark Hohenberger for \$158,494.02, and that Hohenberger sold the cattle to J&F for \$167,308.93. Kremlin further alleges that ELC's check to Kuehny did not clear, and that although J&F paid Hohenberger, Hohenberger stopped payment on his check to ELC and now holds the funds. (Doc. 544, paragraphs 7 – 10].

4. According to the "Purchase Money Proof of Claim" [Claim 242], to which Hohenberger is a party, Hohenberger stopped payment on his check to ELC and is now holding \$158,494.02 in escrow.

Legal Arguments

- 5. The Bank of Kremlin apparently asserts that its security interest continues through the sale by Kuehny to ELC to Hohenberger to J&F. It asserted that the state law of Oklahoma governs [Doc. no. 544, paragraph 13], and has cited to UCC § 9.320. Under that statute, a "buyer in ordinary course of business, other then a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller"
- 6. In the typical lien continuation claim, a bank seeks to collect payment from a buyer who bought farm products from the bank's customer. But in this case, the Bank's loan customer was Brent Kuehny, who did not sell cattle to J&F. Instead, Kuehny sold cattle to ELC, which then sold them to Hohenberger, who then sold them to J&F. Kremlin is therefore making a "thrice removed" lien continuation claim.
 - 7. Defenses that must be addressed under this claim include the following:
 - a. Was Kuehny a "person engaged in farming operations?
 - b. Did the cattle become "inventory" when Kuehny placed them in the possession of ELC, a dealer?
 - c. Did Bank of Kremlin perfect a security interest in "inventory" under the UCC?
 - d. Did Bank of Kremlin perfect a security interest under the Food Security Act, 7 USC 1631?
 - e. Did Bank of Kremlin waive its interest by authorizing a sale?
 - f. Did Bank of Kremlin waive its interest by course of dealing?
 - g. Is Bank of Kremlin estopped from asserting it security interest?
 - h. Did Bank of Kremlin's acquiescence in allowing Keuhny to deliver the cattle to ELC, a dealer, constitute entrustment to a merchant under UCC 2.403(3)? See Official Comment 3, Example 2, to 9.320).
 - i. Does the "created by the seller" exception to the farm products rule of UCC 9.302 apply through the multiple transactions involved here?

- j. Do the shelter rules of UCC 2.403, which allows a party with voidable title, such as ELC and Hohenberger, apply to permit them to pass along to a buyer like J&F better title than they did?
- 8. In addition, the Bank of Kremlin should address whether the doctrine of marshaling of assets applies.
- 9. The Bank of Kremlin should therefore be required to demonstrate facts to support any claim against J&F.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing was served on this the 30th day of September, 2011, via electronic and/or U.S. Mail, upon all parties entitled to receive such notice as provided by the electronic case filing system used by the court.

/s/ David L. LeBas